

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 977(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 977(b). This opinion has not been certified for publication or ordered published for purposes of rule 977.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

KERI WALL,

Plaintiff and Appellant,

v.

CHRISTOPHER ALEXANDER,

Defendant and Respondent.

E032342

(Super.Ct.No. RIC 354172)

OPINION

APPEAL from the Superior Court of Riverside County. Sharon J. Waters, Judge.

Affirmed.

Donna Bader and Kenneth G. Marks for Plaintiff and Appellant.

Davis, Grass, Goldstein & Housouer and Tom M. Allen for Defendant and Respondent.

Plaintiff Keri Wall (Wall) appeals from an order granting defendant Christopher Alexander, M.D. (Alexander), a new trial in her action against him for medical negligence. The trial court determined that the jury had committed misconduct during deliberations by extensively discussing an issue that was not before it. Wall claims that this was an abuse of discretion because the trial court must have relied on inadmissible evidence to reach its conclusion. Not so and we affirm.

FACTS AND PROCEDURAL HISTORY

On January 20, 1999, Wall was working in her position as a personnel management advisor for the Department of the Navy when she injured her right shoulder tacking a notice to a bulletin board. She sought treatment at an urgent care clinic and then with her personal physician, who sent her for physical therapy. Her condition did not improve and she went to see Alexander, an orthopedic surgeon, on April 6, 1999.

Alexander performed an arthroscopic procedure on Wall's shoulder on June 7, 1999, to better diagnose the problem and to repair it. During the surgery, Alexander discovered some laxity in the shoulder joint that he believed was the cause of Wall's symptoms. He therefore performed a capsular shrinkage to correct the problem. Wall's recovery was complicated by a fall and her condition became worse in that she developed a "frozen" shoulder. She subsequently underwent a series of surgeries by several doctors to repair her shoulder and loosen the scar tissue, but they were unsuccessful as her symptoms did not resolve. She also suffered from arthrofibrosis, an abnormal development of scar tissue, and developed reflex sympathetic dystrophy, a condition for which she underwent substantial treatment.

Wall filed a complaint and, after a demurrer, a first amended complaint, against Alexander alleging causes of action for negligence and failure to obtain informed consent. Shortly thereafter, the parties filed a stipulation to dismiss the informed consent cause of action without prejudice. After a trial, the jury returned a verdict finding Alexander was medically negligent and caused injury to Wall, who should recover \$300,000. Judgment was entered reducing that amount to \$250,000 pursuant to Civil

Code section 3333.2, subdivision (b), and awarding Wall a total of \$254,103.65.

Alexander filed a notice of intention to move for a new trial on several grounds, including irregularity in the jury proceedings and jury misconduct. He alleged that the topic that dominated the jury's discussion was whether he had obtained informed consent for the surgery he performed, an issue upon which there had been no evidence (and that he alleged was barred by the statute of limitations), and provided juror declarations to that effect. Wall submitted her own juror declarations in opposition, claiming that the jurors had tried to follow the court's instructions, had based their verdict upon the evidence, and had not committed any misconduct. She also claimed that the juror declarations submitted by Alexander were inadmissible under Evidence Code section 1150.

After a hearing on August 7, 2002, the trial court sustained certain of the evidentiary objections and granted the motion for a new trial. It found that the jury committed misconduct when it engaged in extensive discussion concerning Alexander's failure to stop the exploratory surgery in order to inform Wall before proceeding with a capsular shrinkage procedure. Their discussion of this issue, on which there had been no expert testimony, evidenced their agreement not to follow the instructions that required them to base their verdict solely upon the evidence before them. This appeal followed.

DISCUSSION

Essentially, the sole issue in this appeal is whether the trial court erred by failing to sustain Wall's objections to Alexander's juror affidavits on the ground that they reflected only the subjective thought processes of the jurors and thus were inadmissible

under Evidence Code section 1150. A trial court's decision on an evidentiary objection is reviewed for abuse of discretion. (*People v. Cox* (2003) 30 Cal.4th 916, 955.) A trial court abuses its discretion when its decision exceeds the bounds of reason by being arbitrary, capricious or patently absurd. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 318-319.)

It has long been the law of this state that juror misconduct occurs when evidence is brought into the jury room that was not presented at trial. (*Tunmore v. McLeish* (1919) 45 Cal.App. 266, 268; see also *Smoketree-Lake Murray, Ltd. v. Mills Concrete Construction Co.* (1991) 234 Cal.App.3d 1724, 1746; *People v. Nesler* (1997) 16 Cal.4th 561, 578.) This is because “[i]t is a fundamental rule that all evidence shall be taken in open court and that each party to a controversy shall have knowledge of, and thus be enabled to meet and answer, any evidence brought against him.” (*Tunmore v. McLeish, supra*, 45 Cal.App. at p. 268.) Thus, more specifically, when jurors discuss an issue upon which no evidence was submitted, that discussion constitutes misconduct. (*Tapia v. Barker* (1984) 160 Cal.App.3d 761, 766.) Wall does not dispute this rule.

Evidence Code section 1150, subdivision (a) provides: “Upon an inquiry as to the validity of a verdict, any otherwise admissible evidence may be received as to statements made, or conduct, conditions, or events occurring, either within or without the jury room, of such a character as is likely to have influenced the verdict improperly. No evidence is admissible to show the effect of such statement, conduct, condition, or event upon a juror either in influencing him to assent to or dissent from the verdict or concerning the mental processes by which it was determined.” Our Supreme Court has held “that section 1150

properly distinguishes between ‘proof of overt acts, objectively ascertainable, and proof of the subjective reasoning processes of the individual juror, which can be neither corroborated nor disproved, . . .’ [Citation.] . . . ‘The only improper influences that may be proved under section 1150 to impeach a verdict, therefore, are those open to sight, hearing, and the other senses and thus subject to corroboration. [Citations.]’ [Citation.]” (*Krouse v. Graham* (1977) 19 Cal.3d 59, 80.)

Each of the juror affidavits submitted by Alexander in support of his motion for a new trial indicates that the jury discussed, at length, the issue of informed consent. Juror No. 10 declared: “One of the principal things discussed among the jurors as we deliberated . . . was the issue of informed consent. There was a great deal of discussion on that topic during jury deliberations.” Juror No. 8 declared: “The essence of the discussion was that [the jurors] believed Dr. Alexander should have taken more time to discuss in detail what he was going to do in the exploratory surgery. I would say this is the dominant theme that existed during the jury deliberations.” Juror No. 5 declared: “As I participated in the deliberations with the other jurors, it was clear that a number of the other jurors were focusing on the fact that Dr. Alexander had not taken time to fully explain the procedure which he actually did on Ms. Wall. . . . They generally expressed the view that he should have advised Mrs. Wall that he intended to do the capsule shrinkage procedure and taken more time to go over the actual technique that he was going to be using. It was this issue of informed consent that dominated the discussion prior to the jury’s vote of 9 to 3 in favor of plaintiff.” Juror No. 3 declared: “As we were deliberating in this case, the largest amount of discussion was on the issue of informed

consent. The general consensus of the discussion was [that] Dr. Alexander went ahead with the surgery without getting plaintiff's consent to actually do the capsule shrinkage. The discussion about the lack of informed consent continued throughout the period of our deliberations and was the principal topic of discussion immediately prior to the vote of 9 to 3 in favor of plaintiff." Finally, Juror No. 6 declared: "As we deliberated in this case, the dominant issue which seemed to control the proceedings was the issue of informed consent. There was much discussion that Dr. Alexander set out to perform an exploratory surgery and ended up fixing Ms. Wall's medical problem without specifically advising her in advance, of what he intended to do. This concept constituted most of the discussion immediately prior to the jury voting 9 to 3 in favor of plaintiff."

We recognize that the inviolability of the jury process renders the process of assessing misconduct a difficult one, especially in cases such as this. It is true that certain of the juror statements that the trial court did not strike likely cross the line into territory where violations of Evidence Code section 1150 have occurred. For instance, when the jurors indicate that the theme of informed consent was the "principal" or "dominant" theme of the jury discussions, their choice of words tends to imply that the discussion influenced the verdict. The same can be said of their statements that the informed consent issue was discussed immediately prior to the vote in plaintiff's favor. Drawing such inferences would be improper under Evidence Code section 1150.

However, the statements also reflect an important fact that does not violate the Evidence Code, to wit, that a significant portion of the deliberation time was consumed by a discussion of an improper topic. The extent of the discussions evidences the jury's

intent to ignore the trial court's instructions by considering evidence that was not presented at trial. Given that our standard of review is abuse of discretion, and we must resolve all doubts in favor of the trial court's decision, we must conclude that the trial court ignored the improper inferences, and engaged in those that did not violate Evidence Code section 1150.

Thus, we disagree with Wall and hold that these juror affidavits do not impermissibly show the effect that the statements about informed consent had upon the jury either in influencing the verdict or concerning the mental processes by which it was determined. The cited portions reflect only the fact that statements were made and discussions had by members of the jury concerning the issue of informed consent. They do not state that these discussions caused any juror to render a decision in favor of Wall, nor do they state how the jury arrived at its verdict and thus are not made impermissible by Evidence Code section 1150.

Indeed, it is difficult to envision a case where this type of juror misconduct could be demonstrated without the admission of juror declarations indicating what was discussed. Yet, as we have seen, it is the law of this state that such misconduct is grounds for granting a new trial. (*People v. Nesler, supra*, 16 Cal.4th at p. 578; *Smoketree-Lake Murray, Ltd. v. Mills Concrete Construction Co., supra*, 234 Cal.App.3d at p. 1746; *Tunmore v. McLeish, supra*, 45 Cal.App. at p. 268.) Thus, we are not convinced that the cases cited by Wall, wherein it was determined that the juror affidavits, despite reflecting verbal exchanges, concerned the jury's mental processes in arriving at a verdict and were therefore inadmissible, apply in this case. (See, e.g.,

Mesecher v. County of San Diego (1992) 9 Cal.App.4th 1677, 1682-1684 [alleged misconduct was misinterpretation of instructions, not discussion of improper matter]; *Ford v. Bennacka* (1990) 226 Cal.App.3d 330, 335-336 [same]; *People v. Elkins* (1981) 123 Cal.App.3d 632, 636-638 [same].)

It is not necessarily the case, as Wall argues, that the trial court must have determined that the juror's discussion of improper matter influenced their verdict and therefore considered their mental processes. Rather, as pointed out above, their very discussion of improper matter, with the resultant possibility that the verdict was thereby corrupted, is enough to support a finding of misconduct sufficient to require a new trial. (*People v. Nesler, supra*, 16 Cal.4th at p. 578; *Smoketree-Lake Murray, Ltd. v. Mills Concrete Construction Co., supra*, 234 Cal.App.3d at p. 1746; *Tunmore v. McLeish, supra*, 45 Cal.App. at p. 268.)

Our review of the record reflects that no evidence was submitted at trial on the issue of informed consent. As Wall points out, Alexander did testify that he did not discuss with Wall the possibility that he would do a capsular shrinkage procedure on her. However, there was no expert testimony that the failure to stop the exploratory surgery or to inform the patient about the need for capsular shrinkage was negligent/below the standard of care. The jury was instructed that such testimony was necessary to sustain a verdict of medical negligence. Thus, in light of our conclusion that the trial court did not err in admitting the juror affidavits, there is no reason for us to question either its finding that the jurors improperly discussed an issue on which there was no testimony or its conclusion that this constituted misconduct sufficient to merit a new trial.

Wall also argues that there was no prejudice to Alexander. Her main contention, that there was no evidence of misconduct and therefore there cannot have been any prejudice, fails in light of our discussion above. However, Wall further claims that she demonstrated that there was no prejudice to Alexander by arguing that the jurors swore that they followed the law and instructions provided by the court, and by arguing that there was substantial evidence to support a finding that Alexander was negligent.

In the first instance, Wall has failed to provide any citation to the record in support of these assertions. Thus, we have no basis for determining what portions of her juror declarations she claims we should consider (we note objections were sustained to significant portions of all the juror declarations Wall submitted), nor do we have any inkling what facts she claims constitute substantial evidence upon which we should evaluate the trial court's decision. Her failure is fatal to her argument on appeal. (Cal. Rules of Court, rule 14(a); *Del Real v. City of Riverside* (2002) 95 Cal.App.4th 761, 768.) In addition, she has failed to provide any authority for the proposition that the existence of substantial evidence to support the verdict precludes a finding that juror misconduct resulted in prejudice to the losing party. Our review of the law demonstrates that Wall's standard is not the proper one. (See, e.g., *Province v. Center for Women's Health & Family Birth* (1993) 20 Cal.App.4th 1673, 1679, disapproved on another point in *Heller v. Norcal Mutual Ins. Co.* (1994) 8 Cal.4th 30, 41; *Glage v. Hawes Firearms Co.* (1990) 226 Cal.App.3d 314, 321-323.)¹

¹ At oral argument, Wall pointed out that she provided record citations on this point in her reply brief. We look with disfavor upon arguments that are supported for the

[footnote continued on next page]

Thus, Wall has provided us with no reason to believe that the trial court committed reversible error when it concluded that she had failed to demonstrate that Alexander did not suffer any prejudice as a result of the juror misconduct in this case, nor can we discern such a reason from our review of the record.

DISPOSITION

The order granting a new trial is affirmed. Defendant to recover his costs on appeal.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RAMIREZ

P. J.

We concur:

RICHLI

J.

WARD

J.

[footnote continued from previous page]

first time in a reply brief. In addition, Wall did not respond to our observation that her argument is not supported by the law, a fact that renders her observation regarding the evidence unavailing.